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No. 85-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BANKERS LIFE AND CASUALTY COMPANY,
Appellant,

v.

LLOYD M. CRENSHAW,
Appellee.

On Appeal from the Supreme Court of Mississippi

BRIEF OF APPELLANT

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QUESTIONS PRESENTED

1. Whether the $1,600,000 punitive damage award against appellant on an insurance claim of $20,000 violates the Excessive Fines Clause of the Eighth Amendment of the Constitution of the United States as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, and is otherwise invalid under the Contract Clause and the Due Process Clause of the Fourteenth Amendment, because it is vastly out of proportion to any penalties prescribed by the Mississippi legislature for similar or analogous improper business activities, and because it was imposed under a standard of conduct newly formulated by the court below in this case and applied retrospectively to conduct that occurred years before that standard of conduct was announced.

2. Whether *Miss. Code Ann.* § 11-3-23 (Supp. 1986) under which a mandatory penalty of fifteen percent of any money judgment is automatically imposed on an unsuccessful appellant irrespective of the meritoriousness of the appeal, but which imposes no corresponding burden on completely frivolous appeals filed by plaintiffs who fail to recover money judgments or who cross-appeal when dissatisfied with the size of a money judgment in their favor, is unconstitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.*

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* All parties to this case are named in the caption. Pursuant to Rule 28.1 of the Rules of this Court, the following constitutes a list of all parent companies, non-wholly owned subsidiaries, and affiliates of appellant: Bankers Life and Casualty Company is the wholly owned subsidiary of I.C.H. Corporation; Bankers Life and Casualty Company has controlling interest in, but does not wholly own, the Western Life Assurance Company.

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BRIEF OF APPELLANT

OPINIONS BELOW

The opinion of the Supreme Court of Mississippi dated September 11, 1985, and opinions dissenting, are reproduced in Appendix A of the Appendix to the Jurisdictional Statement, J.S. App. 1a-101a, and are reported at 483 So.2d 254 (Miss. 1985). That court's order of the same date affirming the trial court's judgment and assessing a fifteen percent penalty against appellant is reproduced at J.S. App. 102a and is unreported. That court's order dated February 26, 1986, denying appellant's Petition for Rehearing and overruling appellant's Motion to Correct Judgment is reproduced at J.S. App. 103a and is unreported. The order and judgment of the Circuit Court of Jackson County, dated December 3, 1981, is reproduced at J.S. App. 104a-105a and is unreported; the Circuit Court issued no opinion.

JURISDICTION

The Court has appellate jurisdiction over this case and Question 2 under 28 U.S.C. § 1257(2) because the September 11, 1985 order of the court below imposing a $243,000 appeal penalty on appellant, and the February 26, 1986 order denying appellant's Petition for Rehearing and overruling its Motion to Correct Judgment necessarily upheld the constitutionality of the statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1986), pursuant to which the $243,000 appeal penalty was imposed. This Court has jurisdiction to decide Question 1 as an adjunct to its appellate jurisdiction over Question 2, *see Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975), and pursuant to 28 U.S.C. § 1257(3).

The substance of appellant's challenge to the excessiveness of the punitive damage award as raised in Question

1 was presented to the trial court below in post-trial proceedings, that court holding that it was without authority to reduce the punitive damage award. J.S. App. 51a-52a, 59a, 483 So.2d, at 278-79, 281. On direct appeal, appellant renewed its post-trial challenge to the excessiveness of the $1,600,000 award and invoked for the first time the Due Process Clause of the Fourteenth Amendment. J.S. App. 124a-136a. The court below rejected appellant's challenge to the excessiveness of the award without mention of appellant's express reliance on the federal constitution.

Appellant renewed its federal constitutional challenge to the excessiveness of the award in its Petition for Rehearing, arguing the lack of any "rational relationship between the size of the punitive damage verdict and any legitimate purpose," J.S. App. 151a, and that the punitive damage award "constitutes an excessive fine, violates due process, equal protection and other constitutional standards." In addition, appellant argued that the punitive damage award had been sustained only by virtue of the adoption by the majority of the court below of a new legal standard formulated in this case and applied retrospectively to appellant's conduct, which had occurred years before. J.S. App. 143a-148a.

These articulations of appellant's federal claims in the context of appellant's express reliance on the Due Process Clause of the Fourteenth Amendment, while perhaps inartful, confer jurisdiction over Question 1, which "does not depend on citation to book and verse." *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 n.9 (1982). Any suggestion that the substance of Question 1 was not timely presented is foreclosed by *Hathorn* v. *Lovorn*, 457 U.S. 255 (1982). This appeal was docketed on April 25, 1986, within the ninety-day period for docketing appeals. The Court noted probable jurisdiction on March 9, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and *Miss. Code Ann.* § 11-3-23 (Supp. 1986), are as set forth in the appendix to this brief. App., *infra*, 1a.

STATEMENT OF THE CASE

A Mississippi jury determined that appellant Bankers Life and Casualty Company ("Bankers Life") breached a contractual obligation to appellee Lloyd M. Crenshaw when it failed to pay him $20,000 for accidental loss of limb under a group insurance policy. Punitive damages in the amount of $1,600,000 were also awarded. An additional $243,000 penalty was imposed by the Supreme Court of Mississippi under a Mississippi statute which automatically adds fifteen percent to the judgment against unsuccessful money-judgment appellants. Appellant is also liable for post-judgment interest on the verdict and costs on appeal.

Mr. Crenshaw's leg was amputated below the knee on January 18, 1979. At the time, he was an insured under a policy issued by Bankers Life to his employer, White Stores, a Pascagoula, Mississippi, subsidiary of City Products Corporation. That policy provided a $20,000 benefit for loss of a limb due to accidental bodily injury. The dispute between Mr. Crenshaw and Bankers Life revolved around whether his amputation was attributable to an accident or to degenerative arteriosclerotic disease.

The first medical record of Mr. Crenshaw's alleged injury was on January 9, 1979, when he visited a hospital complaining of pain in his right foot. He testified that he had injured himself on January 6, 1979 when his car's alternator, on which he had been working, "rolled off his work bench and struck the front part of his right foot." J.S. App. 2a, 483 So.2d, at 257.

Mr. Crenshaw's condition apparently deteriorated rapidly after his first hospital visit. He was sent home with a splint and analgesics on January 9, but returned to the hospital again on January 11, 12 and 14. On the 14th, Mr. Crenshaw's physicians admitted him to the hospital and recommended amputation of part of his leg. The surgery was performed on January 18. His surgeon entered a finding that Mr. Crenshaw had "an ischemic right foot with necrosis of the distal aspect." J.S. App. 7a, 483 So.2d, at 258. The pathology report of January 22 concluded in pertinent part: "SEVERE ARTERIOSCLEROSIS OF THE ARTERIES. GANGRENOUS NECROSIS." J.S. App. 8a, 483 So.2d, at 259.

Mr. Crenshaw filled out a Bankers Life proof of claim in April of 1979 which was submitted to the insurer along with certain of Mr. Crenshaw's hospital records, including operation and pathology reports and a narrative summary. J.S. App. 10a, 483 So.2d, at 260.

Mr. Crenshaw's claim under the policy was initially declined by Bankers Life in June of 1979 based upon the opinion of its Medical Director, Dr. Nathaniel P. McParland, a board certified specialist in general and vascular surgery, J.S. App. 64a-65a n.1, 483 So.2d, at 284 n.1 (Robertson, J., dissenting), who relied "on the three medical entries Crenshaw sent with [Mr. Crenshaw's] claim . . . ." J.S. App. 33a, 483 So.2d, at 270. Dr. McParland noted "the absence of the record of the original injury" and concluded that "Mr. Crenshaw's loss of limb was . . . because of severe arteriosclerotic changes in his distal blood vessels and subsequent ischemia and necrosis." J.S. App. 11a, 483 So.2d, at 260.

In response to subsequent communications from Mr. Crenshaw's physicians and attorney stating that trauma was the "precipitating event" which caused his gangrenous necrosis, J.S. App. 14a-17a, 483 So.2d, at 261-64, Bankers Life again declined the claim. Dr. McParland continued to

believe "there was either no trauma or the trauma was insignificant." J.S. App. 20a, 483 So.2d, at 264.

Mr. Crenshaw filed a complaint seeking $20,000 actual and, as amended, $1,635,000 punitive damages. J.S. App. 21a, 483 So.2d, at 264.

Three physicians testified at the trial. A general surgeon testified that "the precipitating cause [for Mr. Crenshaw's amputation] was trauma, probably combined with arteriosclerosis of a severe nature." J.S. App. 21a, 483 So.2d, at 265. The surgeon who performed the amputation acknowledged that Mr. Crenshaw's problems could have been unrelated to trauma. However, he was of the opinion that trauma "aggravated a pre-existing condition which led to loss of the extremity." J.S. App. 23a, 483 So.2d, at 265-66. Dr. McParland testified that arteriosclerosis "alone caused the amputation," J.S. App. 26a, 483 So.2d, at 267, and that "trauma had nothing to do" with Mr. Crenshaw's problem. J.S. App. 27a, 483 So.2d, at 267.

The case was tried before a jury in the Circuit Court in Jackson County, Mississippi commencing on December 1, 1981. On December 3, the jury returned a verdict in favor of Mr. Crenshaw for $20,000 actual and $1,600,000 punitive damages.

The jury verdict was affirmed by the Supreme Court of Mississippi on September 11, 1985. Six justices of the nine member court joined in an opinion upholding the liability of Bankers Life to Mr. Crenshaw for compensatory and punitive damages. Five of those justices rejected Bankers Life's argument that the $1,600,000 punitive damage award was excessive. Three justices dissented on the issues of liability and damages. One justice, the author of the court's opinion on liability, dissented on the ground that the "$1,600,000 punitive damage award was grossly excessive." J.S. App. 54a, 483 So.2d, at 279 (Hawkins, J., dissenting).

The majority below, in affirming the liability of appellant for punitive damages, rationalized its conclusions in terms of previous Mississippi Supreme Court opinions but actually sustained liability on the basis of a previously unarticulated standard and materially lower threshhold. Thus, the majority noted that punitive damages "may be recovered for a willful and intentional wrong, or for such gross negligence and reckless negligence as is equivalent to such a wrong." J.S. App. 29a, 483 So.2d, at 269. In addition, the court below had previously held that an insurer would not be liable for punitive damages if it had an "arguable reason" under *Standard Life Ins. Co. of Indiana* v. *Veal*, 354 So.2d 239, 248 (Miss. 1977), or a "reasonably arguable basis" under *Blue Cross & Blue Shield of Mississippi, Inc.* v. *Campbell*, 466 So.2d 833, 842 (Miss. 1984), for failing to pay a claim. J.S. App. 31a, 483 So.2d, at 269. Notwithstanding these standards, the punitive damage award against appellant was upheld despite appellant's reliance in denying the claim on the opinion of its indisputably qualified expert and medical director. As the dissenting justices observed, "the law is and ought to be that reliance upon the opinion of a qualified expert physician or surgeon should as a matter of law furnish an insurer an arguable reason for refusal to pay a claim." J.S. App. 79a, 483 So.2d, at 291 (Robertson, J., dissenting) (footnote omitted).

The court below rejected Bankers Life's "arguable basis" because the "reason [Bankers Life] gave [Mr. Crenshaw] was not what their doctor had said . . . ." J.S. App. 39a, 483 So.2d, at 273. Relying on a decision from another state subsequently vacated (on other grounds) by this Court, the court below held that the issue was not what the insurer's expert actually determined prior to denial of the claim, the insurer's actual reason for denying the claim, or the basis for denying the claim advanced by the insurer at trial, "but the reason it gave Crenshaw for denying the claim. See: *Aetna Life & Casualty Co., Inc. v. Lavoie*, 470

So.2d 1060 (Ala. 1985 [sic])." J.S. App. 40a, 483 So.2d, at 273. Therefore, because Bankers Life had communicated to Mr. Crenshaw an explanation for denying the claim which was legally unacceptable in Mississippi, "it [had] a final duty to promptly honor [the claim]." J.S. App. 46, 483 So.2d, at 276. Because it did not, the court declared, "[p]unitive damages in such a case is an appropriate, and perhaps the only remedy." J.S. App. 47a, 483 So.2d, at 276.

The dissent pointed out that since Bankers Life's defense to the contract claim was sufficient to send to the jury, the punitive damage claim should not, under Mississippi precedent, have been given to the jury. J.S. App. 63a, 483 So.2d., at 283. And, the dissent observed, the majority decision ignored the standard pursuant to which punitive damages can be assessed in Mississippi. *Id.*

As to damages, the court below held that the amount of punitive damages should be determined based upon the amount necessary to punish and deter the defendant, to deter others, and the "pecuniary ability or financial worth of the defendant." J.S. App. 50a, 483 So.2d, at 278. The court determined that the jury's "sole discretion" with respect to an appropriate punitive award should be disturbed only when the award evinces passion, bias and prejudice on the part of the jury so as to "shock the conscience." "This shock must be experienced by the judicial conscience, not the actual conscience of the members of this Court." J.S. App. 51a, 483 So.2d, at 278. The court held that "[h]owever high [a $1,600,000 award] may 'seem,' " an award amounting to less than one percent of the financial net worth of a defendant could not "shock the judicial conscience." J.S. App. 52a, 483 So.2d, at 279.

SUMMARY OF ARGUMENT

Punitive damages are authorized by courts and awarded by juries to serve the governmental function of punishing

conduct which is perceived as antisocial in order to achieve the goals of retribution and deterrence. As such, their application and exaction are subject to constitutional protections from arbitrary governmental conduct and excessive punishments.

In our society, broad public standards of conduct are typically developed and pronounced by legislative chambers for prospective application. Where penal sanctions are utilized to enforce these standards and advance the public welfare, the laws defining the prohibited behavior must do so with reasonable clarity. The punishments ordained for deviation from such standards must be clear and predictable. Where a financial penalty is exacted to punish a wrongdoer and deter similar conduct in the future, the range of financial sanctions is determined legislatively and announced publicly in advance of their imposition. These penal standards are enforced by officers of the government to ensure accountability, reasonable uniformity, and consistency with long-term public interests. Financial penalties extracted to serve public ends are collected for public use.

In the process described in the foregoing paragraph, constitutional protections developed over seven centuries of English and American law are applied to protect the accused and the convicted from arbitrary, unfair, uneven, excessive and capricious governmental action.

Punitive damages as they are applied and imposed in this country are inconsistent in virtually every respect with the foregoing procedures and constitutional restrictions on unpredictable and extreme governmental conduct. They are imposed for transgressions of vague, elusive and retrospectively applied standards. Punitive damage awards may vary from a few thousand to a few billion dollars without discernible or predictable explanation. Punitive damages reward plaintiffs indiscriminately and impose crushing financial burdens for the most whimsical of reasons.

The Constitution contains protections from excessive governmental punishments drawn almost verbatim from English constitutional provisions which date to Magna Carta. Magna Carta's limitations, the prohibitions of the English Bill of Rights, and the restrictions of the Eighth Amendment were intended to apply to excessive and disproportionate exactions whether imposed in criminal or civil cases if the purposes for their exaction are punishment and deterrence.

Fines or penalties, civil or criminal, are excessive if they are out of proportion to legislatively developed standards adopted after deliberation by elected representatives to apply with uniformity to all similarly situated wrongdoers. The excessiveness of a penalty may be measured by the standards established by our institutions of government charged with the primary responsibility to create rules of conduct and reasonable modes of punishment.

Punitive damages are also subject to traditional standards of due process. While compensatory damages may perhaps be justified even in instances of retroactively imposed legal standards, punishments must be predicated upon foreseeable standards and known penalties.

Mississippi's appeal penalty statute erects a discriminatory barrier to that State's appellate courts which has the effect of discouraging legitimate appeals by one class of litigants while exempting frivolous appeals by others. It cannot survive scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

I

THE $1,600,000 PUNITIVE DAMAGE AWARD VIOLATES APPELLANT'S RIGHTS UNDER THE EXCESSIVE FINES CLAUSE OF THE EIGHTH AMENDMENT

A. The Nature Of The Alleged Wrong And The Characteristics Of The Punitive Damage Sanction

Mr. Crenshaw sought recovery in the courts of Mississippi of $20,000 to which he believed he was entitled pursuant to a contract of insurance. On that claim for breach of contract he engrafted an action for punitive damages for the tort of "bad faith" failure to pay his insurance claim. The courts of Mississippi and many other States have authorized such a proceeding where the plaintiff can allege and prove that the "breach of contract was 'attended by some intentional wrong, insult, abuse, or gross negligence . . . .' " *Pilot Life Insurance Co.* v. *Dedeaux*, No. 85-1043 (Apr. 6, 1987), slip op., at 7, 107 S. Ct. 1549, 1554 (1987), *quoting American Railway Express Co.* v. *Bailey*, 142 Miss. 622, 631, 107 So. 761, 763 (1926).

Although the proponents of the bad faith tort (and other forms of punitive damage actions) attribute to it a broad range of societal goals, the bad faith tort has been recognized by this Court as nothing "more than a way to plead a certain kind of contract violation in tort in order to recover exemplary damages not otherwise available under [state] contract law." *Allis-Chalmers Corp.* v. *Lueck*, 471 U.S. 202, 217 (1985). Thus, appellee has taken advantage of what has been described as the "tortification of contract law," M. Peterson, S. Sarma & M. Shanley, *Punitive Damages* iv (Rand Institute for Civil Justice 1987) ("Rand Report"), under which punitive damages imposed in a civil action rather than a criminal fine imposed in the criminal justice system are employed by the government,

through the court system, to punish and deter conduct perceived to be antisocial. Such interchangeable use of the tort or penal law is not new: "the penal law of ancient communities . . . is the law of wrongs, or, to use the English technical word, of torts." H. Maine, *Ancient Law* 370 (1861).

The penal nature of the $1,600,000 award which was made to appellee was affirmed by the court below:

> [O]ur law would seem to authorize a quantum of punitive damages . . . reasonably necessary to punish defendant and to provide a substantial deterrent to it and others similarly situated from the commission of similar offenses . . . .

J.S. App. 50a, 483 So.2d, at 278.

If a common law rule, like a statute, "imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal." *Trop* v. *Dulles*, 356 U.S. 86, 96 (1958) (Warren, C.J.) (plurality opinion) (footnote omitted). Because they are penal in nature, punitive damages have been characterized by the Court as "private fines levied by civil juries." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). Indeed, as Justice Marshall observed in dissent in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82 (1971), punitive damages "serve the same function as criminal penalties and are in effect private fines."

This transfer to private litigants and civil juries of the power to exact extra-compensatory penal sums renders punitive damages an "anomaly" in "our legal system," in which a

> fundamental premise . . . is the notion that damages are awarded to *compensate* the victim—to redress the injuries that he or she *actually* has suffered. In sharp contrast to this principle, the doctrine of punitive damages permits the award

> of "damages" beyond even the most generous and expansive conception of actual injury to the plaintiff.

Smith v. *Wade*, 461 U.S. 30, 57-58 (1983) (Rehnquist, J., dissenting) (citations omitted).

Punitive damages are anomalous in other important respects:

(1) The maximum amounts in which punitive damages may be assessed in most jurisdictions are, unlike other monetary punishments, not circumscribed by or determined according to meaningful legislative judgments.[1] Thus,

> [b]ecause juries are accorded broad discretion both as to the imposition and amount of punitive damages, the impact of these windfall recoveries is unpredictable and potentially substantial.

Electrical Workers v. *Foust*, 442 U.S. 42, 50 (1979) (citations omitted). *See also Gertz* v. *Robert Welch, Inc.*, 418

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[1] State statutes expressly authorizing the award of punitive damages typically do nothing more than grant *carte blanche* to juries to award such damages in any amount thought appropriate by each jury. *See, e.g., Nev. Rev. Stat.* § 41.333 (1985). Federal statutes expressly authorizing punitive damages sometimes establish limits on the size of punitive awards, *see, e.g.*, 12 U.S.C. § 1723a(e) (punitive damages "not exceeding $100 for each day during which such violation is committed"); 42 U.S.C. § 3612(c) ("not more than $1,000 punitive damages" for violation of fair housing laws); 15 U.S.C. § 1691e(b) (punitive damages no greater than $10,000 or, in class action case, no greater than the *lesser* of $500,000 or one per cent of net worth of defendants), but often fail to do so, *see, e.g.*, 11 U.S.C. § 303(i)(2)(B); 15 U.S.C. § 1681n(2). These federal statutes demonstrate that when legislative judgment is brought to bear in a meaningful way on the quantum of punishment appropriate to achieve the purposes of punishment and deterrence, the maximum levels established bear no comparison with the arbitrary and enormous punitive fines imposed by juries which have been freed to establish their own, one-time "system" of administering punishment.

U.S., at 350 ("juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused").

(2) The diverse social objectives purportedly furthered by the imposition of punitive damages do not include reparation for injuries done to the plaintiff. Yet, the plaintiff is the beneficiary of society's exaction from the defendant. The plaintiff fulfills the classic role of a prosecutor; indeed, punitive damages are sometimes "justified as a 'bounty' that encourages private lawsuits seeking to assert legal rights." *Smith* v. *Wade*, 461 U.S., at 58 (Rehnquist, J., dissenting). *See also* J.S. App. 29a, 483 So.2d, at 269. But under this system, the prosecutor—rather than being paid in proportion to his services—receives the fine which "should go to the State . . . ." 461 U.S., at 59 (Rehnquist, J., dissenting).

(3) Punitive damages are often based, in part, upon the "pecuniary ability or financial worth of the defendant." J.S. App. 50a, 483 So.2d, at 278. Therefore, the size of the award will often depend less on the seriousness of the harm to society caused by the defendant's conduct and more on the wealth of the defendant. Punitive damages may also, as observed by the Court, "be employed to punish unpopular defendants." *Electrical Workers* v. *Foust*, 442 U.S., at 50-51 n.14.

(4) Punitive damages are awarded without discernible standards and are random, capricious, often excessive and invariably unpredictable. Because punitive damage awards as such have never been subjected to constitutional constraints other than those of the First Amendment,[2] they

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[2] Early in its history, this Court confirmed that, as a matter of state law, punitive damages could be made available in certain types of common law actions because such damages were available under English common law. *Day* v. *Woodworth*, 54 U.S. (13 How.) 363, 371 (1851). However, neither in *Day* nor in any other case has the Court ever

remain an isolated bastion of arbitrariness in the imposition of punishment in our judicial system, their imposition being "frequently based upon the caprice and prejudice of jurors." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting).

(5) Finally, given the purely penal nature of punitive damages, there is no doubt that the size of an award and the circumstances of its imposition would be subject to constitutional scrutiny under the Excessive Fines Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment if imposed by a court following a defendant's conviction in a criminal case. For example, if appellant had been convicted in the courts of Mississippi for engaging in an "unfair or deceptive act or practice in the business of insurance" as prohibited by *Miss. Code Ann.* § 83-5-33 (1972), its trial would have been accompanied by the full panoply of procedural safeguards accorded to criminal defendants. More importantly, the maximum fine which could have been assessed upon conviction would have been $1,000. *Miss. Code Ann.* § 83-5-85 (1972).[3]

Appellant's civil trial was, of course, "unaccompanied by the types of safeguards present in criminal proceedings." *Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J.,

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considered how provisions of the federal constitution might be applicable to punitive damage awards except in the context of cases challenging their imposition in libel actions. *E.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974).

[3] This statute makes it a misdemeanor to violate any provision of the insurance laws of Mississippi and imposes a maximum fine of $1,000 upon conviction. Other statutes of Mississippi are directed to misconduct by insurance agents and generally provide for a maximum fine of $500 along with a term of imprisonment. *See Miss. Code Ann.* § 83-17-1 (1972). No Mississippi statute would appear expressly to punish bad faith failure to pay an insurance claim as such.

dissenting). And, in the absence of these safeguards, a fine 1,600 times the maximum fine authorized by the Mississippi legislature for *any* offense arising out of the day-to-day conduct of insurance business in Mississippi was imposed on appellant.

This combination of anomalies under which appellant had the worst of both worlds—civil process and exposure to a potentially unlimited fine, places in perspective the peculiar characteristics of punitive damages in our legal system. Furthermore, the punitive damage "anomaly" is out of control and is having a major impact on our legal system. In California between 1980 and 1984,

> [t]he median punitive damage award in bad faith actions was $336,000. . . . The average was $1.6 million in California, primarily because bad faith awards in Los Angeles County averaged over $3 million.

Rand Report, at vii. "Between 1980 and 1984 punitive damages were awarded in more than one out of every eight jury trials (13.6 percent) in San Francisco in which a defendant was found liable for compensatory damages." *Id.*, at 9. During the same period in California "punitive damages were assessed against 35 percent of defendants who were found to have breached contracts." *Id.*, at viii.

The trend is also clear. In Cook County, Illinois, "[o]ver six times as much money was awarded in punitive damages between 1980 and 1984 as was awarded during the previous twenty years combined." *Id.*, at 14. During the same period, "[j]urors in California awarded a total of $311 million in punitive damages . . . ." *Id.*, at 42.

Punitive damage awards have stepped into the role historically performed by the criminal law—punishment and deterrence—and have even begun to assume some of the frightening characteristics of the penal system of medieval England. Because punitive damages perform the functions

of punishment in our society, their imposition must in turn be subjected to the constraints of the Excessive Fines Clause of the Eighth Amendment.

B. The Excessive Fines Clause Is Applicable To Punitive Damage Awards Rendered In Civil Cases

But for the fact that the Excessive Fines Clause appears in an amendment that is, on its face, concerned with subjects—"bail" and "cruel and unusual punishments"—which are commonly associated with criminal rather than civil cases,[4] the plain language of the Excessive Fines Clause could reasonably be interpreted, as a matter of first impression, to be fully applicable to any monetary "fine" imposed in any civil or criminal proceeding irrespective of whether the purposes of such a "fine" were limited to punishment and deterrence.[5] Appellant's submission does not, however, rest upon such a broad assertion. Rather, this case presents the narrow question whether a monetary fine imposed exclusively for the purposes of punishment and deterrence—the classic objectives of the *criminal* law, *see, e.g., Trop* v. *Dulles*, 356 U.S., at 96, would have been intended by the Framers of the Excessive Fines Clause to be within the protection of that Clause. Although, as discussed below, express evidence of the Framer's intent with respect to the meaning of "fine" in that Clause is

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[4] The Court observed in *Ingraham* v. *Wright*, 430 U.S. 651, 664 (1977), "[b]ail, fines, and punishment traditionally have been associated with the criminal process . . . ." The Court has, however, squarely assumed the applicability of the Excessive Bail Clause in civil cases, *Carlson* v. *Landon*, 342 U.S. 524, 544-46 (1952), thus illustrating that the principles of the Eighth Amendment are not confined to "criminal" cases.

[5] Because, as demonstrated *infra*, modern-day punitive damage awards are the equivalent of amercements and fines under English law, they are clearly within the meaning of the term "fines" as that term was used by the Framers of the Eighth Amendment whether or not the term "fines" would be construed to comprehend the imposition of monetary exactions for purposes other than punishment and deterrence.

scant, the probable intent that may be gleaned from the congressional debates is fully consistent with application of the Excessive Fines Clause to punitive fines imposed in civil actions. Furthermore, more than five centuries of English legal history and practice inherited and understood by the Framers establish that they would have contemplated modern-day punitive damage awards as within the ambit of the Excessive Fines Clause.

1. *The Framers' Placement Of The Excessive Fines Clause In The Eighth Amendment Was Not Intended To Limit Its Applicability To Criminal Cases*

The substantive debate in the First Congress regarding the proposed Eighth Amendment was brief and inconclusive.[6] Standing alone, it is neutral regarding whether the First Congress intended the Excessive Fines Clause or,

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[6] Mr. Smith, of South Carolina, objected to the words "nor cruel and unusual punishments;" the import of them being too indefinite.

Mr. Livermore—The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

The question was put on the clause, and it was agreed to by a considerable majority.

1 *Annals of Congress* 754 (Gales & Seaton eds. 1834).

indeed, the Eighth Amendment in its entirety, to be limited solely to criminal cases. However, applicability of the Eighth Amendment beyond purely criminal cases is a reasonable inference because of the debate and decisionmaking involving the Fifth Amendment, which immediately preceded the Eighth Amendment debate. These two proposed amendments comprised successive clauses (the fifth and sixth clauses) of the "fourth proposition." 1 *Annals of Congress*, note 6 *supra*, at 753. During the debate over the fifth clause (ultimately the Fifth Amendment), an amendment to that clause was offered and adopted to add the words "in any criminal case" in order to ensure that the part of that clause dealing with the issue of self-incrimination would "be confined to criminal cases . . . ." *Id.* Thus, the First Congress clearly knew how to confine provisions of the Bill of Rights to criminal cases if it wanted to do so, and the Fifth (and Sixth) Amendment is ample evidence that when the Framers so intended, they carried out their intentions expressly. At the very least, this history gives rise to a presumption that the Eighth Amendment's protections from excessive or extreme governmental punishments are available irrespective of whether the context in which they may be imposed is technically civil or criminal.[7] As discussed below, this Court's Eighth Amend-

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[7] This presumption is of no less force because the prohibitions on excessive bail, excessive fines and cruel and unusual punishments were joined together in the Eighth Amendment. That joinder can be traced to the joinder of these same prohibitions in the English Bill of Rights of 1689. As discussed in part I.B.4. *infra*, the prohibition of excessive fines in the English Bill of Rights merely incorporated the prohibition of excessive amercements contained in Magna Carta, a prohibition which was fully applicable to punitive fines imposed in civil proceedings. There is no evidence that, in incorporating Magna Carta's prohibition of excessive amercements, Parliament intended to limit that prohibition to criminal cases. Furthermore, the problem of excessive fines was addressed separately from the problem of excessive bail and cruel and unusual punishments in colonial and state declarations which later, *see* part I.B.3. *infra*, became models for the Eighth Amendment. *See, e.g.*,

ment jurisprudence is fully consistent with this presumption.

2. *The Excessive Fines Clause Is Not Limited To Fines Imposed As The Result Of A Criminal Conviction*

A decade ago, this Court was unanimously of the view that:

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analagous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.

Ingraham v. *Wright*, 430 U.S. 651, 669 n.37 (1977); *id.*, at 685 (White, J., dissenting). Almost fifteen years earlier, the Court had struck down a federal statute under that same principle in a case raising issues under the Fifth and Sixth Amendments. *See Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-66 (1963).

Punitive damages are similarly not labeled "criminal," but in theory and practice they are completely "analogous to criminal punishments" because, as discussed above, they serve precisely the same purposes as criminal punishments. When the State of Mississippi placed in the sole discretion of the jury the power to punish appellant by imposing punitive damages, it quite literally "entrusted [the jury] with the criminal-law function of government." 430 U.S., at 664. Thus, if this $1,600,000 award is a "fine" within the meaning of that term in the Excessive Fines Clause, it is subject to the prohibition that it not be "excessive."

Massachusetts Body of Liberties of 1641, § 18 (bail), § 37 (fines) and § 46 (inhumane, barbarious or cruel punishments), *reprinted in* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 73-74, 76, 77 (1971). Thus, it appears that the joinder of these three prohibitions is nothing more than an historical accident carrying no substantive significance for purposes of interpreting the Excessive Fines Clause.

As the following discussion will demonstrate, the punitive damage award in this case is legally indistinguishable from monetary punishments imposed under English common law for more than five centuries prior to the ratification of the Eighth Amendment. The quanta of these monetary punishments were constrained as regards their excessiveness by the direct lineal antecedents of the Eighth Amendment—chief among them the amercements clauses of Magna Carta. These constraints were well known to the colonists and were incorporated into the Excessive Fines Clause.

3. *The Eighth Amendment Preserves In The United States The Same Rights As Were Enjoyed By Englishmen And The Colonists*

Although the extant "legislative history" of the Eighth Amendment is, as noted above, scant if that history is limited to the debates in the First Congress, this Court has repeatedly looked to the English antecedents of the Eighth Amendment—primarily Magna Carta and the English Bill of Rights of 1689—to determine the substantive content of that amendment. In summarizing the nature of this reliance, the Court, in *Solem* v. *Helm*, 463 U.S. 277, 286 (1983), stated:

> Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.

Solem involved the issue of incarceration disproportionate to the offense involved under the Cruel and Unusual Punishments Clause. Thus, the Court had no occasion in *Solem* to consider *directly* the substantive content of the Excessive Fines Clause. The *Solem* Court did, however, make clear that the substantive content of the Eighth

Amendment and its equivalent in the English Bill of Rights of 1689 incorporated directly the rights which Englishmen had enjoyed under Magna Carta since 1215. Specifically, the Court held that Magna Carta's principle "that a punishment should be proportionate to a crime" had been "repeated" in the provision of the English Bill of Rights of 1689 from which the Cruel and Unusual Punishments Clause of the Eighth Amendment was derived. That provision provided that "excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted." 463 U.S., at 285.

Even if the question whether Magna Carta's principle of proportionality had been incorporated in the "cruell and unusuall Punishments" provision of the English Bill of Rights of 1689 were debatable,[8] there can be no doubt that Magna Carta's principle of proportionality was incorporated in the provision prohibiting "excessive fines," because the concept of excessiveness on its face connotes proportionality.

As indicated in *Solem*, in defining and asserting their rights as Englishmen the colonists in the 17th and 18th Centuries turned primarily to two documents, Magna Carta and the English Bill of Rights of 1689. *See* H. Hazeltine, "The Influence of Magna Carta on American Constitutional Development," in *Magna Carta Commemoration Essays* 182 (H. Malden ed. 1917). The influence of the English Bill of Rights of 1689 is clear. The language of the Eighth Amendment is taken verbatim from the Virginia Declaration of Rights of 1776, which in turn was taken from

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[8] Although the dissent in *Solem* v. *Helm* expressed doubt that the "cruell and unusuall Punishments" clause in the English Bill of Rights of 1689 had been intended to incorporate Magna Carta's principle of proportionality, *see* 463 U.S., at 312 (Burger, C. J., dissenting), the dissent did not suggest that Magna Carta's principle of proportionality had not been incorporated in the "excessive fines" clause of the English Bill of Rights.

the English Bill of Rights of 1689. *See Solem* v. *Helm*, 463 U.S., at 285 n.10. This same basic formulation in the Eighth Amendment had also been adopted in 1776 in the Declarations of Rights of Maryland, North Carolina and Delaware in addition to Virginia's Declaration of Rights.[9]

The colonists, including the Framers of the Eighth Amendment, understood that the English Bill of Rights of 1689 was only one expression of their rights and liberties as Englishmen and that the rights declared in that document were by and large reenactments of rights previously recognized, "including the rights and liberties secured by Magna Carta and its confirmations." H. Hazeltine, *supra*, at 189-90 (footnote omitted).[10] Thus, in some of the colonies the concept of proportional monetary punishments was captured in language taken directly from Magna Carta. For example, the Pennsylvania Declaration of Rights of 1776 provided that "all fines shall be moderate," 1 B. Schwartz, note 7 *supra*, at 272, which was merely a shortened version of Section XVIII of the Pennsylvania Frame of Government of 1682, which provided that "all fines shall be moderate, and saving men's contenements, merchandize, or wainage."[11]

This language embodying the concept of proportionality and engrafting on that concept the notion that a fine could not, even if proportional to the offense, destroy the defendant's ability to function usefully within the economy was taken directly from Magna Carta. Magna Carta dealt

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[9] 1 B. Schwartz, note 7 *supra*, at 282 (Maryland), 287 (North Carolina), 278 (Delaware).

[10] The Framers and colonists understood that the English Bill of Rights of 1689 "was a summing up, as it were, and final establishment of the Legal bases of the [English] Constitution." T. Taswell-Langmead, *English Constitutional History* 519 (6th ed. 1905).

[11] 1 B. Schwartz, note 7 *supra*, at 141. The Pennsylvania Frame of Government of 1682 has been described as "the most influential of the Colonial documents protecting individual rights." *Id.*, at 130.

with the problem of excessive monetary punishments in three separate chapters which will be referred to as the amercements clauses. The primary clause, Chapter 20, reads as follows:

> A freeman shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offence, yet saving always his "contenement"; and a merchant in the same way, saving his "merchandise"; and a villein shall be amerced in the same way, saving his "wainage"—if they have fallen into our mercy: and none of the aforesaid amercements shall be imposed except by the oath of honest men of the neighbourhood.[12]

The influence of Chapter 20 on the colonists is clear. As Pennsylvania had done, in its Constitution the State of South Carolina also relied directly on the concept of proportionality derived from the amercements clauses, providing that punishments should be "in general more proportionate to the crime." 1 B. Schwartz, note 7 *supra*, at 335. And as late as 1787, the Continental Congress incorporated Chapter 20's concept of moderation in the Northwest Ordinance, providing that "all fines shall be moderate." *Id.*, at 400.

This reliance on Magna Carta is even more marked in the 17th Century prior to the enactment of the English Bill of Rights of 1689. As in Pennsylvania prior to the Revolution, the colonies of Massachusetts and New York had utilized language from Chapter 20 of Magna Carta in their basic instruments by which their residents asserted

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[12] Magna Carta, ch. 20, *as quoted in* W. McKechnie, *Magna Carta* 284 (2d ed. 1958). Chapters 21 and 22 of Magna Carta applied the principles of Chapter 20 to barons and earls (ch. 21), and the clergy (ch. 22). *Id.*, at 295, 298.

the inherited rights of Englishmen. The Massachusetts Body of Liberties of 1641, adopted by the General Court, is of particular relevance because that document, like the Pennsylvania declarations, not only directly incorporated Magna Carta's concept of proportionality but also assumed the interchangeability of the terms "amercement" and "fine." Section 37 of that document provided authority in the courts to impose on an erring plaintiff "a proportionable fine to the use of the defendant . . . ." 1 B. Schwartz, note 7 *supra*, at 76. Five years later, Section 37 was declared by the General Court to be based directly on the amercements clauses of Magna Carta. A. Howard, *The Road from Runnymede* 404 (1968) (reprinting Massachusetts "Parallels of 1646," para. 7). The Massachusetts Body of Liberties is particularly noteworthy in its incorporation of Magna Carta's prohibition on excessive amercements in a context in which the fine was payable to the other private party rather than to the colony or, as in England, to the Crown. The New York General Assembly subsequently enacted the New York Charter of Libertyes and Priviledges of 1683. The paragraph of that document which addressed the problem of excessive fines was virtually a verbatim reenactment of Chapter 20 of Magna Carta. 1 B. Schwartz, note 7 *supra*, at 165.

These documents provide tangible evidence that the colonists, both before and after the Revolution, regarded Magna Carta and the English Bill of Rights of 1689 as sources of their individual liberties and that they were specifically aware of, and preserved in the Excessive Fines Clause, the prohibitions on excessive monetary punishments found in those documents. As appellant will demonstrate, modern-day punitive damage awards are virtually identical to amercements in theory and in practice and therefore would have been regarded by the Framers and the colonists as being controlled in their size by the Excessive Fines Clause.

4. *Punitive Damage Awards Are The Equivalent Of Amercements And Fines*

In Anglo-Saxon England, most wrongs were punished by requiring the wrongdoer to pay compensatory damages to the person wronged and at the same time to make a further payment which was "due to the community, on the ground that every evil deed inflicts a wrong on society in general, as well as upon its victim." W. McKechnie, note 12 *supra*, at 285. The maximum size of these further payments, known as "wites," was generally uniform, often being established by local rules. *Id.*

After the Norman Conquest in 1066, the Anglo-Saxon system of "wites" was gradually superseded by a system of payments known as amercements. This system was based on the same general theory that a civil wrong generated compensible harm to the public as well as to the wronged person: "offences against the established order were offences also against the King." *Id.*, at 80. However, a crucial difference in the amercement system was that an amercement was limited, at least in theory, only by the grace of the Crown—to whom the amercement was due, because commission of a civil wrong placed the wrongdoer totally at the mercy of the King, whose role was to reestablish the peace by dispensing his justice. *Id.*, at 286.

The amercement system was, over time, recognized by the Crown as an important and lucrative source of revenue, a recognition that resulted in the infliction of increasingly larger amercements. During the reign of John, these monetary penalties were converted into "instruments of extortion," *id.*, at 22, which became a major force behind the presentation of Magna Carta by the barons to King John on June 15, 1215.

Under Chapter 20 of Magna Carta, quoted in full above at p. 23, an amercement had to be "in accordance with the degree of the offence." This concept of proportionality was understood over the centuries as expressing a rela-

tionship between the amercement and the "wrong done to the lord or the court, and not the other party to litigation . . . ."[13] The punitive damage award in this case was "calculated" under precisely the same theory, being imposed for retributive and deterrent purposes rather than to compensate appellee.

Chapter 20 also imposed two additional restraints on the size of amercements which went beyond the concept that an amercement had to be proportional to the offense. Once an amercement was determined to be proportionate to the offense, even that amount could not finally be assessed unless, in the case of a freeman, payment of the amercement would "sav[e] always his 'contenement,' " and in the case of a merchant, "saving his 'merchandise.' " Finally, no amercement could be imposed "except by the oath of honest men of the neighbourhood"—the equivalent of today's jury. To these restraints was engrafted the additional power of the courts to pardon amercements altogether, usually a power exercised on the basis of the "poverty" of the person amerced. *See* W. McKechnie, note 12 *supra*, at 288.

The amercements clauses were popularly regarded as among the most important provisions of Magna Carta: "Very likely there was no clause in Magna Carta more grateful to the mass of the people than that about amercements." F. Maitland, *Pleas of the Crown for the County of Gloucester* xxxiv (1884).

The amercements clauses and Magna Carta's principle of proportionality applied to civil and criminal wrongs alike. Although over the next five centuries the term "amercement" gradually fell from common usage to be replaced

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[13] *See Nova Narrationes*, in 80 Selden Society cci (E. Shanks ed. 1963) (footnote omitted).

by the word "fine,"[14] the English "Constitution" required that such monetary exactions, however denominated, be reasonable in amount. Blackstone expressly recognized that amercements had historically been imposed as civil punishments regulated by the amercements clauses of Magna Carta in the same fashion as fines had come to be regulated in criminal cases after the separation of criminal and tort law in England had begun:

> The reasonableness of fines in criminal cases has also been usually regulated by the determination of *Magna Carta*, concerning amercements for misbehaviour *in matters of civil right*.

4 W. Blackstone, *Commentaries on the Laws of England* *372 (footnote omitted) (emphasis added). In the 18th Century, Blackstone records no fewer than six circumstances involving private litigants in which the defendant, found liable, would have been required to pay a fine to the Crown as well as compensation to the plaintiff. *See* 3 W. Blackstone, *Commentaries on the Laws of England* *118-19, *138, *179, *188, *398, *402 (1768). As explained by Blackstone, the sum due to the Crown was assessed for the "public misdemeanor which is coupled with a private injury." *Id.*, at *398.

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[14] In the 13th Century, the term "fine" was used to denote a sum paid to the Crown or court as essentially a bribe or means of buying justice in advance of an adjudication. W. McKechnie, note 12 *supra*, at 292-93. The term "amercement," on the other hand, "signified the pecuniary mulct laid upon an individual who had offended the King." T. Taswell-Langmead, note 10 *supra*, at 92. Although not widely used in this country, the term "amercement" did find a place in patent law, as illustrated by the case of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238 (1944). In that case, Justice Roberts, in dissent, took the position that the Court's action in effectively reinstating a district court judgment holding a patent invalid resulted in a situation in which "the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit . . . to punish one wrongdoer for the benefit of another . . . ." *Id.*, at 270.

5. *Modern Private Fines Levied In Civil Actions Which Combine The Reparative And Punitive Functions Would Have Been Subject To The Amercements Clauses*

By the middle of the 18th Century, English courts began to recognize power in a jury to impose "exemplary" or punitive damages in a tort action. The earliest situations were cases in which juries had returned excessively large verdicts against government officials that could not be explained by reference to actual damages.

The term "exemplary damages" was first used in the case of *Huckle* v. *Money*, 2 Wils. K.B. 205, 95 Eng. Rep. 768 (C.P. 1763). In *Huckle*, the jury had awarded 300*l* in damages against a magistrate found to have falsely imprisoned the plaintiff. Although the court evaluated actual damages at no more than 20*l*, it refused to set aside the verdict. The court reasoned that the jury's award must have been based on the spectre of "a magistrate over all the King's subjects, exercising arbitrary power . . . ." *Id.*, at 207, 95 Eng. Rep., at 769. Thus, the court focused on the danger to the general public posed by a magistrate gone out of control and the corresponding need to control such behavior through the imposition of a large "exemplary" award.

In refusing to reduce the award, the court in *Huckle* assumed that it had very little, if any, authority to second guess the size of the jury's verdict, treating the jury's punitive award as no different in this regard from a verdict for actual damages and observing "that it is very dangerous for the Judges to intermeddle in damages for torts." *Id.*[15] This assumption was, given the status of the defendant

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[15] In the late 19th Century, it was observed that the reasoning of the early "exemplary" damage cases in England and the United States "amount[ed] to no more than a refusal to set aside" the large awards being returned by juries which could not be explained solely by reference to what "actual" damages had been sustained by the plaintiff. W. Hale, *Handbook on the Law of Damages* §§ 87-88, at 302 (2d ed. 1912).

as a government agent, not inconsistent with the amercements clauses of Magna Carta because Magna Carta's limitations on the size of punitive awards were not believed to be applicable to amercements or punitive fines imposed on "those who have administration of justice . . . ." *Griesley's Case*, 8 Co. Rep. 38a, 40a, 77 Eng. Rep. 530, 534 (C.P. 1588). Punitive awards against government officials had not, however, lost their character as amercements; they continued "as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself." *Wilkes* v. *Wood*, Lofft. 1, 19, 98 Eng. Rep. 489, 498-99 (C.P. 1763).

"Exemplary" damages were employed thereafter to deter individuals from seeking personal revenge for a wrong done to them by other private persons. *See Merest* v. *Harvey*, 5 Taunt. 442, 128 Eng. Rep. 761 (C.P. 1814); *Grey* v. *Grant*, 2 Wils. K.B. 252, 95 Eng. Rep. 794 (C.P. 1764).[16] Initially, the reasoning offered by the English courts to justify their allowance of "exemplary" or punitive damages payable to plaintiffs who had been wronged by other private persons was confused. Sometimes this practice was explained in terms of compensation for "intangible wrongs." *See, e.g., Tullidge* v. *Wade*, 3 Wils. K.B. 18, 95 Eng. Rep. 909 (C.P. 1769) (public nature of tort occasioned greater actual damages). Such non-punitive rationales gradually faded in the 19th Century as English courts expanded the content of "actual" damages to comprehend "intangible" harm such as emotional distress. *See, e.g., Andrews* v. *Askey*, 8 Car. & P. 7, 173 Eng. Rep. 376 (C.P. 1837).

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[16] These cases reflect the thinking which led originally to the demise of "bloodfeud" under which Anglo-Saxons were entitled to take personal revenge on someone who had wronged them. "Bloodfeud" had given way to the system of compensation coupled with the payment of "wites" discussed in part I.B.4. above. *See* W. McKechnie, note 12 *supra*, at 284-85.

The result of this evolution in modern English tort law was that the "compensatory" rationales for punitive damages were no longer available to justify such excessive awards. This in turn led to the courts' recognition that the only remaining justifications for such damages in excess of actual harm suffered by the plaintiff were punishment and deterrence—the precise rationale under which amercements had been justified. Thus, the English courts appear in the 18th and 19th Centuries simply to have adopted the model from medieval times under which the reparative and punitive functions of the law had been joined in civil actions subject to the amercements clauses, and applied that model to private tort actions. The only difference between these ancient and modern civil actions was that the punitive damages became, with virtually no explanation, payable to the plaintiff rather than the Crown.

The same ambiguity is present in "punitive damages" cases in the United States in the early 19th Century, with many cases rationalizing punitive or exemplary damages as being simultaneously compensatory and punitive. *See, e.g.*, *McNamara* v. *King*, 7 Ill. (2 Gilm.) 432, 436 (1845). As in England, the gradual expansion of the concept of actual damages to include compensation for intangible injuries such as mental anguish left "nothing for 'exemplary damages,' as formerly understood, to operate upon . . . ." *Fay* v. *Parker*, 53 N.H. 342, 384 (1872). Thus, "exemplary" damages came to be understood "to refer to criminal punishment for the sake of public example . . . ," *id.*, or as "punishment, and to preserve the public tranquility." *Hawk* v. *Ridgway*, 33 Ill. 473, 475 (1864).

Since the middle of the 19th Century, the purely "punitive" purposes of punitive damage awards in the United States have been generally recognized. As demonstrated above, however, the theoretical basis for these awards remained, and continues to remain, unchanged from the early 13th Century when such awards were subjected to control by the amercements clauses of Magna Carta. The doctrine

was, in the late 19th Century, "well characterized as 'a sort of hybrid between a display of ethical indignation, and the imposition of a criminal fine.' " W. Hale, note 15 *supra*, at 303. Also as demonstrated above, there is no principled distinction to be drawn between contemporary punitive damage awards and the punitive component of awards rendered in common law actions to which the amercements clauses were applied.

When the Framers of the Eighth Amendment incorporated the proportionality principles of the amercements clauses of Magna Carta into the Eighth Amendment, they necessarily preserved for persons in the United States at least the protection from excessive punitive fines as had been enjoyed under those clauses for almost six centuries as summed up in the English Bill of Rights of 1689.

C. The $1,600,000 Punitive Damage Award In This Case Is Constitutionally Excessive

The distinctive feature of a punitive damage award which makes it functionally and legally indistinguishable from an amercement or a fine also serves to frame the inquiry whether such an award is excessive under the Excessive Fines Clause. As discussed in part I.A. above, the purpose of the punitive damage award in this case is to inflict punishment for a wrong to society and to deter similar conduct. Thus, the punitive damage award bears no relation to the damage inflicted on appellee. Rather, it purportedly serves to vindicate the alleged wrong to the public in much the same way as would monetary penalties imposed under a criminal statute. This Court's decision in *Solem* v. *Helm*, although it involved an issue of proportionality under the Cruel and Unusual Punishments Clause, provides an appropriate starting point for the determination whether the $1,600,000 punitive damage award in this case is constitutionally excessive.

1. *The Inquiry Into Disproportionality Under* Solem *v.* Helm

In *Solem*, the Court considered whether a sentence of life imprisonment imposed on a recidivist convicted of uttering a $100 check on a non-existent account was constitutionally excessive. 463 U.S., at 281-84. The Court looked to three factors:

> (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.

Id., at 292.

There is an initial difficulty in attempting to apply these three factors to the punitive fine in this case because the fine was imposed on a completely *ad hoc* basis by a jury that performed several functions which would customarily be performed by a legislature. For example, if the legislature of Mississippi, rather than the Supreme Court of Mississippi, had determined that conduct of the type involved in this case was worthy of criminal punishment, the legislature presumably would have made that determination in a statute which would have given notice with reasonable specificity of the conduct prohibited and would simultaneously have prescribed a range of punishment sufficient, in the legislature's view, to punish the conduct and to deter others from engaging in similar conduct.

Although the Mississippi legislature has enacted legislation punishing certain types of conduct occurring in the course of conducting the business of insurance, *see* note 3 *supra*, it has not passed legislation expressly punishing, either criminally or civilly, conduct constituting bad faith failure to pay an insurance claim as such. Thus, it is uncertain just how "grave" this offense is in Mississippi, although one reasonable inference to be drawn is that the legislature of Mississippi does not regard bad faith failure

to pay an insurance claim as a sufficiently serious or widespread problem to warrant legislative intervention. By the same token, because no limit has been established by either Mississippi's legislature or its courts on the size of punitive damage awards which may be imposed by Mississippi juries in bad faith cases, it is difficult to determine in such a vacuum the relative harshness of the $1,600,000 punitive award. It was imposed under a system in which each jury is free to impose a punitive award in virtually any amount for virtually any reason. By any common-sense standard, however, a punitive fine of $1,600,000 for refusal to pay a $20,000 claim based upon the professional judgment of an expert later determined by a jury to have been incorrect appears, on its face, to be draconian.

Because punishment for violating Mississippi's bad faith "law" is open-ended in terms of severity, the second line of inquiry established by *Solem* is more illuminating. The legislature of Mississippi has in fact made criminal certain types of conduct occurring in the insurance industry. For example, had appellant, instead of denying appellee's disputed claim on the basis of expert medical opinion, made a misrepresentation to appellee "for the purpose of inducing" him to "surrender his insurance," *Miss. Code Ann.* § 83-5-35(a)(1972), or made an "untrue, deceptive, or misleading" statement "with respect to the business of insurance," § 83-5-35(b) (1972), appellant could have been convicted, after a criminal trial, of a misdemeanor and subjected to a maximum fine of $1,000 under § 85-5-85. Because such misconduct under either § 83-5-35(a) or (b) could have, in theory, led to unjust denial of appellee's insurance claim in this case, appellant's "offense" in this case is presumptively no more "grave" than the conduct prescribed by § 83-5-35(a) or (b). The harshness and disproportionality of the punishment, however, is quite clear: appellant's fine is 1,600 times larger than the maximum monetary criminal fine deemed appropriate by the legis-

lature of Mississippi to punish and deter insurance companies engaged in similar conduct.

The third criteria suggested in *Solem*—punishments imposed for the same offense in other jurisdictions—is complicated in its application by the need to determine whether to be guided by the judgments reached by state legislatures in statutes or the verdicts of juries which are administering an *ad hoc* system of inflicting unrestrained monetary punishment on insurance companies alleged to have acted in bad faith. Mississippi's sister state of Alabama is a prime example. The Alabama legislature has provided that an insurance company should be required to pay 1-1/2% per month of an outstanding insurance claim "until it is finally settled or adjudicated" if the claim is ultimately determined to have been wrongfully denied. *Ala. Code* § 27-1-17(b) (1986). On the other hand, an Alabama jury decided that the Aetna Life Insurance Company should be punished in the sum of $3,500,000 for bad faith failure to pay a $1,650 insurance claim, a punishment eventually reduced to $500,000 by the Supreme Court of Alabama. *See Aetna Life Insurance Co.* v. *Lavoie*, 505 So.2d 1050 (Ala. 1987). If Aetna in that case had been penalized under § 27-1-17, its punishment would have been less than $5,000. Other similar conflicts between legislative judgments and the decisions of individual juries abound.[17]

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[17] For example, in *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 277 (1964), the Court observed that the $500,000 punitive damage award against the *Times* was "one thousand times greater than the maximum fine provided by the Alabama [criminal libel] statute" for the same essential conduct. More recent examples are commonplace. An intermediate appellate court in California recently affirmed a $5,000,000 punitive damage award against an insurance company in a "bad faith" case, *Downey Savings and Loan Ass'n* v. *The Ohio Cas. Ins. Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (Ct. App. 2d Dist.), *pet. for rev. denied*, No. S 000553 (Cal. May 27, 1987), even though the California legislature has provided a maximum fine of $500 for knowing failure by an insurance company to "effectuate prompt, fair, and equitable

Appellant submits that the appropriate, *objective* measure of the excessiveness of a punitive damage award imposed by a civil jury should be the relationship of a punitive damage award to the monetary punishment exacted by the legislature of that jurisdiction (and, as necessary, other jurisdictions) for the same or similar conduct.[18] Because jurors in punitive damage cases operate without meaningful guidance or bounds established either legislatively or judicially, their individual determinations imposing punitive damage awards represent precisely the type of "subjective judgments" which this Court has "eschewed," *McCleskey* v. *Kemp*, No. 84-6811 (Apr. 22, 1987), slip op., at 17, 107 S. Ct. 1756, 1771 (1987), in trying to "ascertain objective indicia that reflect the public attitude toward a given sanction . . . ." *Id.*, at 17, *quoting Gregg* v. *Georgia*, 428 U.S. 153, 173 (1976). As the Court went on to state in *McCleskey*:

> First among these indicia are the decisions of state legislatures, "because the . . . legislative judgment weighs heavily in ascertaining [contemporary] standards" . . . .

Slip op., at 17, *quoting Gregg* v. *Georgia*, 428 U.S., at 175.[19] Determining the disproportionality of punitive dam-

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settlements of claims." *See Cal. Ins. Code* § 790.03(h)(5) (West. Supp. 1987). The Arizona Supreme Court recently reinstated a $3,500,000 punitive damage award in a "bad faith" case, *Hawkins* v. *Allstate Ins. Co.*, 733 P.2d 1073 (Ariz. 1987), notwithstanding that the Arizona legislature has provided a maximum monetary punishment of $5,000 for conviction of a felony involving a deceptive business practice. *See Ariz. Rev. Stat.* § 13-2202(1978).

[18] In its brief filed in the court below on direct appeal, appellant pointed out that the $1,600,000 punitive damage award was grossly out of line as compared with statutory penalties for breach of insurance contracts which had been enacted in Georgia, Arkansas and Tennessee. J.S. App. 131a-132a. Because Mississippi's legislature has not adopted any legislation penalizing the precise type of conduct for which punitive damages were sought in this case, resort to that legislature's judgments regarding similar conduct is appropriate.

[19] In cases such as *Gregg* v. *Georgia*, 428 U.S. 153 (1976), the Court

age awards based upon their relationship to comparable legislative judgments would ensure an objective, rather than subjective, consideration of this question. In addition, assessing proportionality in this manner would be faithful to the process by which the excessiveness of punitive awards was determined under Magna Carta.

2. *The Inquiry Into Excessiveness Under Magna Carta*

As this Court observed in *Solem* v. *Helm*, the amercements clauses of Magna Carta "were not hollow guarantees, for the royal courts relied on them to invalidate disproportionate punishments." 463 U.S., at 285.[20] As discussed in part I.B.4. above, the purpose of Magna Carta was to reduce the arbitrariness and excessiveness of

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has also looked to the punishments imposed by criminal juries as evidence that particular punishments do or do not reflect contemporary social values. However, criminal juries, in stark contrast to civil juries called upon to impose punitive damages, operate within a framework of restraints on the amount of punishment they may inflict based upon prior legislative judgments. In such cases, jury discretion has, by statute, been "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.*, at 189.

[20] Mississippi's system of permitting jurors to impose punitive damage awards in unlimited amounts based upon the wealth of the defendant and their *ad hoc* judgment as to how large a punishment would be required to punish and deter that defendant and others, is fundamentally offensive to Magna Carta, the Excessive Fines Clause, and concepts of due process embodied in the Due Process Clause of the Fourteenth Amendment. If, for example, a criminal statute provided that persons with annual incomes above $100,000 were subject, for the same offense, to greater potential prison sentences or criminal fines than persons with less annual income, that statute would raise grave constitutional questions under decisions such as *Robinson* v. *California*, 370 U.S. 660 (1962) (punishment of "status" held unconstitutional). It is one thing to provide that in imposing punishment a judge may consider the wealth of a defendant in finally arriving at an appropriate punishment within a range of punishments previously established by the legislature to which all persons, regardless of wealth, are subject. It is quite another matter, however, to establish a two-tiered system of different maximum punishments for the same offense based solely upon the wealth, or any other similar status in society, of the defendant.

amercements which had become, in John's reign, tools of "extortion." The process by which amercements were finally assessed had much to do with eliminating the arbitrariness of amercements.

Chapter 20 required that an amercement be "in accordance with the degree of the offence." Consistent with this requirement, limits on amercements for particular offenses had frequently been established even before 1215 by local rules or customs which were the equivalents of statutes. *See* J. Holt, *Magna Carta* 50, 230-32 (1965). In medieval England, a two-step process developed under which judges would, in the absence of a fixed amercement for a particular offense, establish the maximum amercement, it being their "duty to see that the amount was proportionate to the gravity of the offence." W. McKechnie, note 12 *supra*, at 288 (footnote omitted). Under this process, amercements were "usually uniformly assessed," J. Holt, *supra*, at 231 n.2, but if an amercement seemed excessive (and often when it did not), a second step in the process put the issue, as required by the last clause of Chapter 20 of Magna Carta, to a "jury" of peers of the person to be amerced.

The function of these peers was not, as was true of the jury in this case, to set the maximum possible punishment and then to impose it based upon their view of the underlying cause and their unbridled emotions at the close of argument. Rather, the function of these peers under Magna Carta in this second step was to *reduce* the amercement set by the judges or other authority "in accordance with their knowledge of the wrong-doer's ability to pay." W. McKechnie, note 12 *supra*, at 288. Thus, Magna Carta did not permit English juries to impose amercements based on the wealth of the person to be amerced; indeed, Magna Carta was believed to outlaw any amercement greater than the actual damages suffered by the plaintiff.[21] Instead, it

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[21] According to Fitz-Herbert, the requirement of Magna Carta that

maintained and strengthened a rational system under which a relatively uniform schedule of amercements emerged; within that system, a jury of peers could provide some relief based in part on the *lack of wealth* of the person amerced.

Aberrant cases arose after Magna Carta, and Chapter 20 was enforced. In *Le Gras* v. *Bailiff of Bishop of Winchester*, Y.B. Mich. 10 Edw. II, pl. 4 (C.P. 1316), reprinted in 52 Selden Society 3 (1934), a writ was brought by Le Gras challenging a one-mark amercement by the Bailiff in connection with Le Gras's role as plaintiff in a suit. Le Gras apparently complained that the amercement was procedurally defective because it had been assessed by the Bailiff rather than his peers as required by Magna Carta, and that it was excessive as being disproportionate to his offense. The decision was that the Bailiff was ordered to "take a moderate amercement proper to the magnitude and manner of the offence, according to the tenour of the Great Charter of Liberties . . . ." 52 Selden Society, at 5 (footnote omitted).

A 17th Century case provides further support for the proposition that the amercements clauses of Magna Carta were interpreted to require that fines bear a close relationship to punishments for similar offenses which were by that time largely determined by acts of Parliament. In that case, the Earl of Devon had been fined 30,000*l* before the King's Bench. He appealed to the House of Lords, arguing, *inter alia*, that the fine was excessive, *Earl of Devon's Case*, 11 State Tr. 1354, 1357 (1689), contending. that the fine was disproportionate to fines established by statute for similar offenses: "wherever the law has set down a fine, either by way of punishment or caution, it seldom exceeds 2,000*l*." *Id.*, at 1364. The House of Lords

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an amercement be moderate meant "that if it exceed the Value of the Trespass, it is not a moderate amercement . . . ." A. Fitz-Herbert, *Natura Brevium* 168 (6th ed. 1718).

concluded, three months after the English Bill of Rights of 1689 was enacted, that

> the fine of 30,000*l* . . . was excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.

Id., at 1370. This 17th Century invocation of the amercements clauses in connection with the imposition of an excessive fine confirms the vitality of those clauses after the English Bill of Rights of 1689, demonstrates that those clauses applied to "fines" as a form of 17th Century punishment, and illustrates how the English by then inquired into excessiveness—by reference to the more recent development of statutes as the primary means of setting criminal punishments.[22]

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[22] Measuring excessiveness by comparing punitive damage awards to the punishments established for similar conduct by state legislatures would also advance the purpose of Chapter 20's proviso that in no event may an award destroy a defendant's ability to continue to function within society. Under Chapter 20, an amercement otherwise proportional to the offense could not be imposed on a merchant unless it "sav[ed] his 'merchandise.' " In the 17th Century, Coke explained the rationale for this provision:

> For trade and traffique is the livelihood of a merchant, and the life of the commonwealth, wherein the king and every subject hath interest, for the merchant is the good bayliffe of the realme to export and vent the native commodities of the realme, and to import and bring in the necessary commodities for the defence and benefit of the realme.

E. Coke, *The Second Part of the Institutes of the Laws of England* 27-28 (5th ed. 1797). This Court has applied the principle that a fine must be proportionate to the offense and the principle of "salvo contenemento." In *United States* v. *United Mine Workers*, 330 U.S. 258, 304 (1947), a majority of the Court, "consider[ing] the amount of defendant's financial resources and the consequent seriousness of the burden [of a $3,500,000 fine for criminal contempt] to that particular defendant," held that fine to be "excessive as punishment for the criminal contempt theretofore committed." *Id.*, at 305. The fine was remitted conditionally to $700,000 for an offense held by the Court to

II

THE IMPOSITION OF PUNITIVE DAMAGES ON THE BASIS OF A NEWLY ANNOUNCED STANDARD OF LIABILITY IMPOSED RETROSPECTIVELY TO THIS CASE VIOLATES THE CONTRACT CLAUSE AND THE DUE PROCESS CLAUSE OF THE CONSTITUTION

Prior to the decision in this case by the court below, the substantive rules under which punitive damages could be imposed in Mississippi were, even if somewhat opaque, reasonably settled in that punitive damages were available only when a breach of contract was "attended by some intentional wrong, insult, abuse, or gross negligence . . . ." *See Pilot Life Insurance Co.* v. *Dedeaux*, slip op., at 7, 107 S. Ct. at 1554, *quoting American Railway Express Co.* v. *Bailey*, 142 Miss., at 631, 107 So., at 763. This rule had been reiterated by the court below in *Standard Life Ins. Co. of Indiana* v. *Veal*, 354 So.2d 239 (Miss. 1977), two years before the operative facts in this case occurred. In addition, it was also clear in Mississippi as recently as 1984 that an insurance company could not be held liable for punitive damages in a bad faith case if it had an "arguable reason" for denying a claim. *Blue Cross & Blue Shield of Mississippi Inc.* v. *Campbell*, 466 So.2d, at 842.

In its decision in this case, the court below changed the rules, holding for the first time that punitive damages are available in Mississippi, regardless of wrongful motive, if the insurer *lacked* a legally sufficient "arguable basis" for rejecting a claim. The court below also changed the rules in another material respect. The court held that an insurer not only must have an arguable basis for denying a claim, but it must assert that precise basis in denying a claim in order to rely on that basis as a defense against a claim

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have presented "a serious threat to orderly constitutional government, and to the economic and social welfare of the nation." *Id.*

for punitive damages. J.S. App. 30a-32a, 36a, 483 So.2d, at 269, 271.

Whether addressed as a violation of the Due Process Clause of the Fourteenth Amendment or the Contract Clause,[23] Mississippi's recognition in this case of a materially relaxed standard for the imposition of punitive damages and the application in this case of that new standard to uphold the punitive award cannot be sustained in light of the extremely limited interest of Mississippi in providing to appellee a windfall totally unrelated to any damages suffered by appellee.

As this Court has recently reiterated:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

Roberts v. *United States Jaycees*, 468 U.S. 609, 629 (1984), *quoting Connally* v. *General Construction Co.*, 269 U.S. 385, 391 (1926). The *Roberts* Court went on to explain the

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[23] In *Aetna Life Insurance Co.* v. *Lavoie*, No. 84-1601 (Apr. 22, 1986), 106 S. Ct. 1580 (1986), appellant Aetna Life Insurance Company ("Aetna") argued to the Court that the recognition by the Supreme Court of Alabama of a right of action for bad faith refusal to pay an insurance claim could not, consistent with the Contract Clause, be applied retrospectively to impose a new and material obligation on an insurance contract entered into and performed prior to that recognition. Aetna specifically argued, Br. of Appellant, at 30-35, that the word "law" as it appears in the Contract Clause comprehends judge-made common law. Although *dictum* in this Court's decision in *Tidal Oil Co.* v. *Flanagan*, 263 U.S. 444 (1924), would support the argument that the Contract Clause applies only to legislative—as opposed to judicial—lawmaking, this Court's recognition that Aetna's Contract Clause argument raised an "important issue," slip op., at 14, 106 S. Ct., at 1589, necessarily rejected the argument that that *dictum* in *Tidal Oil* is viewed by the Court as foreclosing appellant's reliance in this case on the Contract Clause.

underlying rationale for this first principle of due process in language which applies directly to the case at bar:

> The requirement that government articulate its aims with a reasonable degree of clarity ensures that state power will be exercised only on behalf of policies reflecting an authoritative choice among competing social values, reduces the danger of caprice and discrimination in the administration of the laws [and] enables individuals to conform their conduct to the requirements of law . . . .

Id. Where, as here, an essentially criminal penalty has been imposed, this Court's cases make clear that "the standard of certainty is higher." *Kolender* v. *Lawson*, 461 U.S. 352, 359 n.8 (1983). And as discussed above, the standards under which appellant's penalty was assessed were basically non-existent when appellant's conduct occured.

In *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down under the Due Process Clause a Pennsylvania statute under which a jury, having acquitted a criminal defendant, was authorized to award court costs against the defendant. The Court condemned the statute as "leav[ing] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be . . . ." *Id.*, at 403. Mississippi's law of bad faith is vastly worse because such decisions of juries may be accompanied by enormous penalties.

In a very real sense, appellant has been "convicted" for violating a "law" which literally did not exist in Mississippi until the decision of the court below was handed down. Having had no fair warning that its conduct was "illegal," appellant has been punished in the sum of $1,600,000 for its reliance on its expert medical director to deny appellee's debatable claim. There can be no doubt that under

standards laid down by the Court, this punishment is "harsh and oppressive." *United States* v. *Darusmont*, 449 U.S. 292, 299 (1981). There is also no doubt that this punishment is focused exclusively on the "blameworthiness" of appellant and the purpose of achieving "deterrence" of similar conduct, the two objectives identified by the Court as least likely to sustain the retrospective imposition of *civil* liability. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976). The *Turner Elkhorn* rule is undoubtedly of greater force in the context of liability imposed exclusively for the purposes of punishment and deterrence.

Furthermore, a clear majority of the Court has

> recognize[d] that "the alleged deterrence achieved by the punitive damages awards is likely to be outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined."

Dun & Bradstreet, Inc. v. *Greenmoss Builders, Inc.*, 472 U.S. 749, 780 n.4 (1985) (Brennan, J., dissenting, joined by Marshall, Blackmun and Stevens, JJ.), *quoting Smith* v. *Wade*, 461 U.S., at 59 (Rehnquist, J., dissenting, joined by Burger, C.J., and Powell, J.). Where, as here, the standards are not only "ill defined" but were in fact non-existent at the time the contract at issue was entered and performed, Mississippi has "no substantial interest in securing for [appellee] gratuitous awards of money damages far in excess of any actual injury." *Gertz* v. *Robert Welch, Inc.*, 418 U.S., at 349.

III

MISSISSIPPI'S APPEAL PENALTY STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED

Unless the Court vacates the judgment below on the basis of appellant's challenges to the punitive damage award,[24] the Court must decide whether Mississippi's appeal penalty statute, *Miss. Code Ann.* § 11-3-23 (Supp. 1986), pursuant to which a punitive fine of over $240,000 was imposed on appellant for having unsuccessfully appealed the judgment of the trial court, is constitutional under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. As appellant will demonstrate, § 11-3-23 constitutes nothing more than an "automatic assessment of unproved damages" and therefore is plainly unconstitutional under the Court's decision in *Lindsey* v. *Normet*, 405 U.S. 56, 78 (1972).

A. Section 11-3-23 Places A Constitutionally Impermissible Burden On Appellant's Exercise Of Its State-Law Right To Appeal

Mississippi is one of four States which, by statute, impose a mandatory appeal penalty on litigants who unsuccessfully appeal from a money judgment. Under § 11-3-23, a fifteen percent penalty is imposed on the unsuccessful appellant solely because the judgment is affirmed.[25] Thus, even if, as in this case, a money judgment is affirmed by

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[24] If the Court vacates the judgment below based upon appellant's challenge to the punitive damage award, the Court's order would have the legal effect of vacating in its entirety the order of the court below, J.S. App. 102a, by which the fifteen percent appeal penalty was assessed, because that penalty is dependent on the existence of a trial court judgment which has been affirmed by the court below. If appellant prevails on any of its arguments respecting the punitive damage award, the constitutionality of § 11-3-23 will not be before the Court.

[25] Although many States have in place, by statute or rule, mechanisms

a narrow 5-4 majority of the court below in a case in which the appellant is unsuccessful only because the court creates new law, the assessment—which is "in the nature of a penalty," *Meek* v. *Alexander*, 137 Miss. 117, 121, 102 So. 69, 70 (1924)—is automatically made.

The court below has stated that § 11-3-23 "expresses the state's interest in discouraging frivolous appeals." *Walters* v. *Inexco Oil Co.*, 440 So.2d 268, 274 (Miss. 1983). It has also been stated that a purpose of the statute is to "provid[e] a measure of compensation for the successful appellee." *Id.* In this case, most of the award is simply a penalty on a penalty and is not compensatory in any sense.

Under § 11-3-23, appellant was exposed to this appeal penalty because it incurred a money judgment against it in the trial court. If instead appellant had prevailed in the trial court, appellee could have taken an entirely frivolous appeal to the court below without incurring any risk that an appeal penalty of any kind would be imposed.[26] Section

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designed to deter frivolous appeals, the Court observed just this Term that only three States, in addition to Mississippi, impose a non-discretionary, mandatory penalty following the affirmance of a money judgment without regard to the novelty or complexity of the factual or legal issues presented in a particular appeal. *Burlington Northern R. Co.* v. *Woods*, No. 85-1088 (Feb. 24, 1987) slip. op., at 2 n.1, 107 S. Ct. 967, 969 n.1 (1987). These three other States are Alabama, *Ala. Code* § 12-22-72 (1986); Kentucky, *Ky. Rev. Stat.* § 26A.300 (1985); and Virginia, *Va. Code* § 16.1-113 (Supp. 1986).

[26] Mississippi has no statutes or rules under which a party taking a completely frivolous appeal is subjected to monetary sanctions based upon the frivolousness of its appeal.

In Mississippi, if a victorious plaintiff is dissatisfied with the size of a money judgment and files what proves to be an unsuccessful appeal prior to the filing of an appeal by the defendant, the judgment awarded against the defendant will be reduced by fifteen percent. *See Pearce* v. *Ford Motor Co.*, 235 So.2d 281, 283 (Miss. 1970). However, as *Pearce* makes clear only the initial appellant bears any risk of incurring an appeal penalty because the other party may file a cross-appeal without having imposed on it an appeal penalty even if the judgment on its

11-3-23, the arbitrary penalty it imposes, and the irrational classifications it creates, are plainly unconstitutional.

1. *The Appropriate Standard Of Review*

In *Lindsey* v. *Normet*, the Court established the parameters under which a statute affecting the exercise of a state-law right to appeal would be reviewed when challenged as violative of the Fourteenth Amendment. In *Lindsey*, the Court struck down an Oregon statute which required a tenant appealing from an adverse decision to comply not only with general rules applicable to appeals but, in addition, to post a double bond covering twice the rental value of the property. Then, if the decision were affirmed on appeal, the appellee landlord was "automatically entitled to twice the rents accruing during the appeal without proof of actual damage in that amount." 405 U.S., at 76.

In striking down the Oregon scheme which, like § 11-3-23, provided nothing but a windfall to appellees unrelated to any costs incurred by them in defending their judgments on appeal, the Court did not question that a State could enact "reasonable procedural provisions to safeguard litigated property or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends *and* if they are uniformly and nondiscriminatorily applied." *Id.*, at 78 (emphasis added). But, § 11-3-23 is neither "reasonably tailored" to the stated ends it seeks to achieve, nor is it applied in a uniform, nondiscriminatory fashion.

2. *The Appeal Penalty Is Not Reasonably Tailored To Achieve Any Legitimate State Purpose*

The legitimate state interest in curbing frivolous appeals cannot be advanced as a defense of § 11-3-23. Indeed,

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appeal is affirmed. Thus, in this case only Bankers Life bore the risk of being penalized for exercising its right to appeal from the outset of this litigation until its conclusion in the court below.

because § 11-3-23 does not even permit the court below to determine whether an appeal is frivolous, this asserted justification for the burden imposed by § 11-3-23 on appellants is in fact no justification at all. In any event, even if curbing frivolous appeals is accepted as a purpose of § 11-3-23, it is not "reasonably tailored" to advance that purpose. It is grossly overinclusive because it sweeps within it substantial appeals. It is simultaneously underinclusive in that Mississippi does *nothing* to penalize the taking of frivolous appeals by plaintiffs who fail to secure money judgments at the trial level or who cross-appeal in an attempt to secure an even larger judgment. Thus, § 11-3-23 bears no rational relationship to the salutary objective of curbing frivolous appeals.

There is likewise no rational relationship between penalties assessed under § 11-3-23 and the purpose of providing "compensation" to a prevailing appellee. First, the penalty bears no relationship to the costs, including attorneys' fees, which the appellee may have incurred in defending the appeal. This Court necessarily held as much in *Burlington Northern R. Co.* v. *Woods*, where it determined that Alabama's mandatory appeal penalty statute was in conflict with Rule 38, Fed. R. Civ. P. The Court contrasted Rule 38 with § 11-3-23, declaring the latter to be in conflict with Rule 38 because it had "the effect of . . . penalizing every unsuccessful appeal regardless of merit." Slip op., at 5, 107 S. Ct., at 970. Unlike an award pursuant to Rule 38, which may legitimately be viewed as compensation, an award under § 11-3-23 is simply a windfall to the appellee of the kind found impermissible in *Lindsey* v. *Normet*.

Second, where the penalty is assessed upon a punitive damage award which itself bears no relationship to the actual damages suffered by the appellee in connection with the underlying action, the penalty cannot be said to act as compensation for any *losses* suffered by the appellee based upon the underlying conduct of the appellant which

resulted in the money judgment.[27] There is no state interest in this arbitrary penalty mechanism sufficient to overcome the Court's admonition that limitations on a state-created right of appeal must be "reasonably tailored" to achieve legitimate purposes.

B. The Appeal Penalty Operates In An Impermissibly Discriminatory Fashion

Even if § 11-3-23 were determined to be "reasonably tailored" to achieve the purposes of that statute as articulated by the court below, it is manifest that it treats litigants differently and that the differing treatment cannot be justified given the importance the Court assigned in *Lindsey* v. *Normet* to the proposition that litigants should have equal access to a state's appellate system. Under *Lindsey*, Mississippi may not at any stage of litigation discriminate in favor of any class of litigants by permitting that class to take completely frivolous appeals without fear of punishment while it punishes another class with a substantial, mandatory penalty for taking a substantial appeal. When the states place a financial burden on the taking of an appeal, they must "impose this financial burden upon all . . . whose appeals have been unsuccessful." *Rinaldi* v. *Yeager*, 384 U.S. 305, 308 (1966). As held by this Court in *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U.S. 150, 153 (1897), litigants must "enter the courts upon equal terms." Appellant and appellee did not, by virtue of § 11-3-23, do so and, therefore, § 11-3-23 must fall.

CONCLUSION

"Punitive damages" is a misleading label. They are not restitution for injury caused to the plaintiff and should not

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[27] The interests of a judgment creditor in Mississippi in the judgment itself are protected by *Miss. Code Ann.* § 75-17-7 (Supp. 1986), which provides for post-judgment interest from the date of entry of the judgment until the judgment is paid.

be considered analytically as "damages." They are penalties which juries are permitted to impose in order to punish and deter. The fact that these penalties are paid to private litigants is immaterial in evaluating the constitutional implications of these penal fines.

A pervasive theme of the Constitution is the promise of protection from capricious and extreme governmentally imposed penalties. The power of government is at its most intimidating and potentially devastating when it exercises its authority to punish. The Excessive Fines, Due Process and Equal Protection Clauses all serve to place limits on the exercise of punitive governmental authority. Multi-million dollar, government sanctioned, jury imposed, discretionary fines, whether labelled civil or criminal, cannot withstand scrutiny under these fundamental protections.

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APPENDIX

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Excessive Fines Clause of the Eighth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or [shall] excessive fines [be] imposed . . . ."

2. The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

3. The Due Process Clause of the Fourteenth Amendment of the Constitution provides, in pertinent part, that:

> "[N]or shall any State deprive any person of . . . property, without due process of law . . . ."

4. The Contract Clause, Art. I, § 10, cl. 1 of the Constitution, provides, in pertinent part, that:

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ."

5. Section 11-3-23 of the Mississippi Code Annotated (Supp. 1986) provides, in pertinent part, that:

> "In case the judgment or decree of the court below be affirmed, or the appellant fails to prosecute his appeal to effect, the Supreme Court shall render judgment against the appellant for damages, at the rate of fifteen percent (15%), as follows: If the judgment be for a sum of money, the damages shall be upon such sum . . . ."